92-1033

No.

Supreme Court, U.S.
FILED
DEC 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1992

DAVID JAMES TEMPLETON,
RACHEL TEMPLETON,
MICHAEL VENEGONI
AS TRUSTEE OF THE SEVEN EIGHTEEN TRUST,
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER A STATE'S STATUTE OF LIMITATIONS COVERING SUITS FOR FRAUD, BARS THE UNITED STATES OF AMERICA FROM BRINGING SUIT FOR FRAUD BEYOND THE TIME LIMIT ESTABLISHED BY THE STATE.

WHETHER THE 7TH CIRCUIT COURT OF APPEALS CAN VIOLATE ITS OWN STANDARD FOR SUMMARY JUDGMENT AND AFFIRM SUMMARY JUDGEMENT WHEN THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE.

WHETHER A FEDERAL COURT HAS JURISDICTION TO VOID A CONTRACT MADE WITHIN THE TERRITORIAL JURISDICTION OF THE STATE OF INDIANA

PARTIES TO THE PROCEEDINGS

1. Petitioners David and Rachel Templeton

   Petitioner Trustee, Michael Venegoni

2. Respondent, The United States of America

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STATEMENT OF JURISDICTION

The opinion of the 7th Circuit Court of Appeals was rendered on August 10, 1992.

Defendants entered Petitions for Rehearing and those were denied on August 31, 1992 and September 22, 1992.

This Petition For a Writ of Certioriari is being filed in accordance with Rule 13.1 of the Rules of the Supreme Court.

This court has jurisdiction over this proceeding pursuant to Title 28 United States Code, Section 1257 and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Indiana Code
I.C. 34-1-2-1-4 The following actions shall be commenced within six (6) years after the cause of action has accrued, and not afterwards...Fourth: For relief against frauds.

United States Constitution:
No person shall be...deprived of...property without due process of law... Fifth Amendment.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved... Seventh Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Tenth Amendment

STATEMENT OF THE CASE

David James and Rachel Templeton (Templetons) purchased the property at 718 Pontiac Street, Rochester, Indiana, in 1967.

On April 15, 1980, Templetons filed a tax return for the year 1979.

On November 2, 1982, Templetons put the property into The Seven Eighteen Trust as Grantors. There were three trustees, Peter W. Terpstra, Sr., Max A. Beer, and Victor McMahan. Just four pages of the Trust Agreement were recorded in the local courthouse, showing the date of the establishment of the Trust, and signatures of Templetons and the three Trustees.

The Irrevocable Trust Agreement consisted of many pages, four (4) of which were recorded in the local courthouse; the first two indenture pages, and the last two signature pages.

The deed transferring the property to the Trust, contained the usual statement of consideration, "One Dollar and other good and valuable considerations." The body of the Trust Agreement reveals among other things, the details of the consideration, the beneficiaries, the purpose of the trust, the nature of the beneficiaries' interest, the trust property, the nature of the trustees' interest, and the purpose of the Trust.

The three (3) original Trustees were not members of Templetons family.

At the time of the transfer, Templetons were the ownersd, in addition to the property, of two businesses and had interests in other real properties.

At the time of the transfer Templetons signed a Lease Agreement with the Trust and continued to live in the property, commencing to pay a monthly

rental fee to the Trust and paying the utility bills.

At the time of the transfer there was no suit pending against Templetons.

On April 28, 1984, the Internal Revenue Service (IRS) made an alleged assessment against Templetons and filed a lien in the local courthouse on the Trust, for any right, title or interest Templetons held in the property in question, and allegedlly assessed Templetons back taxes in the amount of $43,792.72, with $2,189.64 in negligence penalties and $28,789.69 in interest.

On October 22, 1988, the trustees Peter W. Terpstra, Sr., and Victor McMahan, resigned as trustees, leaving one trustee, Max A. Beer.

On April 20, 1989, The IRS filed suit against the Trustees and Templetons, to reduce the alleged assessment against

Templetons to judgment and to declare the Trust void, or to declare the conveyance fraudulent, and to foreclose on the property.

The IRS attached to their complaint only two (2) of the recorded pages of the Trust Agreement which they had retrieved from the local courthouse, and alleged that the Trust Agreement was only two (2) pages in length, and listed no beneficiaries and insufficient consideration.

Templetons and the Trustee answered the Complaint denying the critical allegations.

The Trustee, Michael Venegoni, stated that the complaint was time barred, since it was beyond the Indiana Statute of Time Limitations. The complaint was filed six (6) years and five (5) months after the transfer. The Indiana statutory limit for

bringing actions against property for fraud is six (6) years (I.C. 34-1-2-1-4).

The Trustee also filed affidavits from the original three Trustees which stated that they were familiar with the Trust Agreement and were competent to testify as to its contents, and that there were indeed beneficiaries and sufficient consideration.

Templetons' affidavits also stated that there are beneficiaries and sufficient consideration to the Trust; and that they owned other significant property at the time of the transfer.

The government moved for summary judgment, alleging that Templetons were the legal owners of the property because the transfer to the Trust was void, either because no valid trust was created or because the transfer was a fraudulent conveyance.

The government attached to their motion for summary judgment, a declaration affidavit by IRS agent Forsgren, in which he stated that Templetons continued to live in the property, and that he could find no other property of marketable value that Templetons owned at the time of the transfer; also that Mrs. Templeton and the trustees were members of the same group. To support his conclusions, his affidavit was accompanied by two papers from two utility companies showing those two utilities were in Templetons' name. Templetons and the Trustee objected to summary judgment stating that the Trust Agreement was more than two-pages long, and that it indeed lists the beneficiaries and the consideration. The Trustee stated that he would agree to an in-camera inspection by the court of the entire Trust Agreement. Templetons also offered

their copy of the entire Trust Agreement to the court for an in-camera inspection.

Templetons listed the other properties they owned at the time of transfer some of which were recorded in the same courthouse where the government had gone to record their lien. Templetons also attached copies of income tax returns showing two business properties, and reminded the government that they already had this information in their possession.

In the course of the case, by statements and with a total of six (6) affidavits, defendants showed:

(1) The Trust Agreement is more than two pages in length. A copy of the entire Trust Agreement was offered to the District Court and the Appellate Court, for their in-camera inspection. (2) There are indeed beneficiaries listed in the Trust Agreement.

(3) Templetons owned other significant properties at the time of the transfer.

(4) There was sufficient consideration in the transfer.

(5) Templetons retained no ownership in the property; rather there was a bonafide landlord-tenant relationship between Templetons and the Trust.

(6) The Lease Agreement between Templetons and the Trust called for Templetons to pay their own utility bills.

(7) The Trustees were not members of Templetons family.

(8) The Trustee asked for a jury trial on the facts in dispute.

In March, 1990, the Trustee Max A. Beer resigned and appointed Michael Venegoni as Trustee.

On March 5, 1991, the District Court granted summary judgment to the IRS, with

no hearing and no trial, deciding that the Trust Agreement was only 2-pages long, that there were no beneficiaries to the Trust, there was insufficient consideration, that Templetons owned no other property of significant value at the time of the transfer, that Templetons were the equitable owners of the property and that the government was entitled to foreclose on the property and that there were no genuine issues of material facts in dispute.

The court stated that Officer Forsgren's affidavit:

> "Adequately set forth the basis for his knowledge and that he has relevant information to these proceedings because he is a representative of the IRS with knowledge of taxpayers' tax filings."

The court found that the affidavits of Templetons and the original three trustees:

"...alleged various legal conclusions without suggesting their basis in fact or attchment of supporting documentation."

As for the Trustee's allegations that Indiana state statute of limitations barred the action, the court held that even though the Federal courts apply state substantive law in actions to set aside a fraudulent conveyance and foreclose on a federal tax lien, the Federal courts do not apply the state's statute of limitations.

On March 15, 1991 and March 21, 1991 defendants Templeton and the Trustee filed Motions to Alter Judgement. Templetons objected to the court's refusal to view the entire Trust Agreement in-camera, to clear up the inaccurate facts on which the court's decision was based.

They again stated that upon the court's request, they would come forward with a copy of the entire Trust Agreement

for an in-camera inspection, which would show the beneficiaries and the consideration. Templetons mentioned again the other properties they owned at the time of the transfer and also objected to the fact that no hearing had been held, as they felt they had not had "due process" to clear up the inaccurate facts about the Trust Agreement or to cross examine Officer Forsgren concerning his inaccurate conclusionss in his declaration.

On April 8, 1991 the District Court denied both motions, stating that:

> "...taxpayers' failure to move for the court to inspect the trust agreement in camera and their failure to produce any portion of the trust agreement in response to the government's motion for summary judgment, resulted in that document's omission, and not the court's failure to accept it."

On the basis of the Trust Agreement allegedly being only two pages long and

therefore listing no beneficiaries and no consideration, and that Templetons still lived in the property, and that Officer Forsgren said he could find no other properties owned by Templetons at the time of the transfer, the court denied the motions to alter judgment.

On May 6, 1991 and May 22, 1991, The Trustee and Templetons timely filed their Notice of Appeal to the 7th Circuit court of appeals.

On June 14, 1991, the District Court consolidated the Trustee's appeal with Templetons' appeal.

The District Court's decision was appealed to the Seventh Circuit Court of Appeals, asking them to remand the case back to the District Court for a jury trial.

The Seventh Circuit, consolidating the appeals, denied both, adopting the

District Court's opinion.

Petitions For Rehearing With Suggestion For Rehearing En Banc were filed with the Seventh Circuit by defendants, and both were denied by September 22, 1992.

ARGUMENT

WHETHER A STATE'S STATUTE OF LIMITATIONS COVERING SUITS FOR FRAUD, BARS THE UNITED STATES OF AMERICA FROM BRINGING SUIT FOR FRAUD BEYOND THE TIME LIMIT ESTABLISHED BY THE STATE.

Defendants stated that the Indiana statute of limitations on actions alleging fraud, bars the government's complaint. The transfer of property took place on November 2, 1982. The complaint was brought on April 20, 1989, six years and five months later. Indiana Code 34-1-2-1 states:

> "The following actions shall be commenced within six (6) years after the cause of action has accrued, and not afterwards...Fourth: For relief against frauds."

The District Court stated:

> "Federal courts apply state substantive law in actions to set aside a fraudulent conveyance and foreclose on a federal tax lien, but do not apply the state's statute of limitations."

The court cited two cases, Comm. vs. Stern, 357 U.S. 39, 42-45 (1958):

> "Federal courts apply state substantive law in actions to set aside a fraudulent conveyance and foreclose on a federal tax lien."

and United States v. Fernon, 640 F.2d 609 (5th Cir. 1981) which quotes United States v. Summerlin 310 U.S. 414,416 (1940):

> "...but do not apply the state's statute of limitations."

The government admits they are a "creditor" in this instant case; thus there is no difference between the government wanting a property, as a creditor, and an individual wanting a property as a creditor. See District Court Order Pg 15 line 20; Pg. 16, line 8;

> "Fraudulent intent generally is a question of fact, and no conveyance or charge will be adjudged fraudulent against creditors..."

And the government's Memo

In Support of Summary Judgment Page 7, line 25, states: "...it is not necessary to show actual intent to defraud a creditor..." (Emphasis added)

And In the original Complaint, Pg 3 line 32:

> "...creditors of (Templetons) including the United States of America."

In DIF Bank Deutsche v. Fluormatic Corp. U.S, 7th Cir. WestLaw 43339, Lexis 1647, February 14, 1992, the question concerned the application retroactively of the state statute of limitations governing a fraudulent conveyance. It was a "given" throughout, that the state statute of limitations applied to that case in federal court.

Also in Concepcion Giove v. Jeanne Stanko, (8th Cir) October 2, 1992, WestLaw 249101, Lexis 24794, in a case similar to

the 7th Circuit case above, the 8th Circuit court held that it found State statute of limitations governed. It stated that Nebraska's statue of limitations mandated, and that the parties were bound by Nebraska's state statute of limitations.

Also in Suslick v. Rothschild, 741 F 2d 1000, 1004, 1005, (7th Cir. 1984), the 7th Circuit ruled that since there is no general federal statute of limitations, the State statute of limitations would apply:

> "Both parties agree that because there is no general federal statute of limitations...the appropriate limitations Act in the forum state of Illinois controls." (Pg. 1004).
>
> "The Supreme Court has held that where the federal courts adopt a state statute of limitations in the absence of a specific statute enacted by Congress, the courts must also adopt the state rules tolling

that statute of limitations..."
Pg. 1005

But most supportive of defendants' position is the Judge's comments in a case in the Hawaiian District Court from January, 1992, (United States v. Vellalos, 780 F. Supp 7050) which runs parallel to this case. The following is a paraphrase of the judge's opinion from that case.

The law of real property has traditionally been within the province of the states. The government in this instant case has cited no federal statute that would restrict the states' rights to allow the federal government to legislate in the area of fraudulent real estate transfers.

The government is seeking to take advantage of a right that is entirely within the domain of the state. This right was created by a state statute and specifically limited by the text of that

statute.

This is not a straightforward question of debt collection under the common law as was addressed by the Supreme Court in Summerlin. The government seeks to stretch the Summerlin holding to cover all state laws which in any way peripherally affect the collection of a debt by the government.

To endorse the government's position would have the effect of stripping away state authority without any legitimate reason short of expediency on the part of the Internal Revenue Service.

Such a holding would be an unjustified and improper expansion of the Summerlin principle.

Fernon and Stern, are the result of an overly mechanical application of the dicta in Summerlin without serious consideration of the significant

implications such a rule has for state sovereignty.

The Fernon court failed to analyze the issue. In a discussion that extends for less than a paragraph, it merely presumes that Summerlin is controlling precedent.

To the extent the federal government desires an unlimited statute of limitations period with which to combat fraudulent transfers, it can create a federal fraudulent transfer statute, and explicitly adopt such an unlimited limitations period.

Although there is no such federal statute, 26 U.S.C. Sec. 6901(c) sets forth a summary procedure by which the IRS can collect taxes from transferees who are found to be fraudulent transferees under state law.

This section, however, has even a

shorter limitations period than the Indiana state law. See 26 U.S.C. Sec 6901(c) (initial transferee remains liable for a period of one year after the expiration of the period of limitation for assessment against the transferror). In fact, it is only because the federal government missed this statute of limitations that it is attempting to bring an action directly under the state statute instead of under the summary procedure set forth in 26 U.S.C. Sec 6901(c).

Because the legislators of the State of Indiana, under the authority of the Indiana Constitution have been specific in providing for a literal extinguishment of the cause of action upon expiration of the prescribed time period

- because the state has the power to extinguish a cause of action which was entirely within its power to create;

- and because the government has not provided any convincing authority or justification for exempting itself from the state extinguishment provision, the United States has no cause of action.

WHETHER THE 7TH CIRCUIT COURT OF APPEALS CAN VIOLATE ITS OWN STANDARD FOR SUMMARY JUDGMENT AND AFFIRM SUMMARY JUDGMENT WHEN THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE.

The standard for summary judgment in the 7th Circuit under Rule 56, has been set, so that summary judgment cannot be granted when there are genuine issues of material facts in dispute.

The standard for summary judgment was established by this court in Anderson v. Liberty Lobby, 477 U.S. 242,248; 106 S.Ct. 2505, 2510 (1986):

> "The evidence of the non-movant is to be believed and all justifiable inferences are to be

drawn in his favor. Covalt v. Carey, 950 F2d 481 (7th Cir. 1991)"

and Celotex v. Catrett, 477 U.S. 317, 323-24 (1986):

> "A party bearing the burden of proof in an issue may not simply rest on his pleadings, but must demonstrate with specific factual allegations that a genuine issue of material fact exists and requires a trial."

A court has only to determine that there is one fact in dispute, in order to deny Plaintiff summary judgment. If there is a genuine issue of material fact, the court may neither dismiss the suit nor grant summary judgment. (See Smith vs. Nixon, 101 S.Ct 3147, 102 S.Ct. 892, on remand 582 F.Supp 709, 716).

GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE

Defendants put forth affidavits in the District Court, as well as stating in

their pleadings, showing that there are genuine issues of material fact in dispute in this instant case.

The lower courts made decisions on the following facts, which are inaccurate: (All of the adjacent correct facts were stated in the record.)

(1) The Trust Agreement is only two pages long. (WHEN IN FACT the Trust agreement is much longer. An offer for the entire Trust Agreement to be brought into court for an in-camera inspection was made to both lower courts by defendants.)

(2) The Trust Agreement lists no beneficiaries or sufficient consideration. (WHEN IN FACT the entire Trust Agreement lists the beneficiaries and the consideration which is sufficient.)

(3) Templetons retained control over the property even after the transfer. (WHEN IN FACT Templetons signed a Rental

Lease agreement with the Trust at the time of the transfer, and there is a bonafide landlord/tenant relationship between them. Templetons continue to pay the utility bills, which is normal for a tenant.)

(4) Templetons owned no other significant property at the time of the transfer. (WHEN IN FACT Templetons owned several significant properties of commercial value at the time of the transfer. Templetons reminded the government that other properties which Templetons owned at the time of the transfer were known to the government, being recorded for taxes in the same courthouse where the government retrieved the two pages of the Trust Agreement in preparation of their complaint, and being listed in tax returns which information the government already had in its possession.)

The above shows genuine issues of material facts in dispute, which should have halted the grant of summary judgment and assured defendants a jury trial. The District Court ruled in favor of the government, even though it knew it did NOT have the entire Trust Agreement before it, and could not honestly make any decision concerning the Trust Agreement, since any decision it would make would be on the basis of inaccurate facts.

> "...a court may not decide issues of fact on a motion for summary judgment. National Surety Co. vs. 1st Nat'l Bank of Indiana 106 F Supp. 302."

7th CIRCUIT CASE LAW GOVERNING SUMMARY JUDGMENT

> "Summary judgment is a valuable judicial tool. Because the consequences are so severe, we must always guard against premature truncation of legitimate lawsuits merely because of unskilled presentation. Murrell v. Bennett. 615 F2d 306, 311, (5th Cir. 1980)." Kincaid v. Vail,

969 F2d 594 (7th Cir. 1992)

Defendants are proceeding in their own proper persons, without counsel. Therefore, the lower courts should have guarded against "premature trunication" of this case, merely because of unskilled presentation. When defendants offered the entire Trust Agreement to the courts for in-camera inspection, the courts denied them that opportunity. Defendants were never told that there was some special technicality needed to obtain an in-camera inspection of a private document. Instead both courts said it was defendants fault for not bringing forth the entire Trust Agreement. Defendants merely wanted to be assured that the Trust Agreement would be kept in-camera and private. If brought in without specific request by the courts, Defendants could not be assured that the document would be protected from public

view.

The 7th Circuit violated its own standard, as set forth in the following case:

> "...for a fair and just disposition of a claim, the party opposing summary judgment must have a reasonable opportunity to demonstrate that there is a genuine issue of material fact. Murrell vs. Bennett. 615 F2d 306,311 (5th Cir 1980)." Kincaid vs. Vail, 969 F2d 594 (7th Cir. 1992)

Defendants were not given a reasonable opportunity to demonstrate that there is a genuine issue of material fact. When they stated so, in affidavits and pleadings, the courts refused to acknowledge it. Defendants could not know that they would be denied a trial, but would be required to present all their evidence on paper to the judge without opportunity for a hearing.

The standard in the 7th Circuit is to

draw all inferences in light most favorable to defendants.

> "...in determining whether there are any genuine issues of material fact, court of appeals draws all inferences in light most favorable to nonmovant..." Bank Leumi v. Lee, 928 F2d 232 (7th Cir. 1991).
>
> "On review, this circuit draws all inferences from the record in the light most favorable to the party opposing the motion. Beard v. Whitley County REMC, 840 F2d 405, 409-10 (7th Cir. 1988).
>
> "Rule 56 principles impose on movant the burden of establishing the lack of a genuine issue of materials fact. For that purpose the court is called on to draw all reasonable inferences, not every conceivable inference in the light most favorable to nonmovant. DeFalk v. Ford, 811 F2d 326, 329 (7th Cir. 1987)." Resolution Trust Corp vs. Juergene, 965 F2d 149 (7th Cir. 1992)

The evidence presented by defendants should have been accepted and believed and all justifiable inferences should have

been drawn in favor of defendants.

> "The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor..." Anderson vs. Liberty Lobby, 477 U.S. 242, 248; 106 S.Ct. 2505, 2510.

Thus, defendants were entitled to a jury to evaluate their credibility.

> "Thus, (his) affidavit is to be believed. Reasonable inferences...are to be drawn in his favor. Viewing the evidence in the light most favorable to (the non-movant) and drawing all reasonable inferences in his favor...he was entitled to have a jury evaluate the credibility of (him)..." Covalt v. Carey, 950 F2d 481 (7th Cir. 1991) (Emphasis added)

The 7th Circuit Court of Appeals did not draw all inferences from the record in light most favorable to non-movant.

> "...the proper comparison is not to an ideal case, but to the minimum required to survive a motion for summary judgment." Covalt vs. Carey, 950 F2d 481 (7th Cir. 1991)

In this instant case, Defendants put

forth affidavits which demonstrated at least a minimum requirement to show that there are genuine issues of material facts in dispute. According to the standard established by the 7th Circuit Court, it should have drawn any permissible inferences from defendants' affidavits, and summary judgment should not have been allowed to stand.

DEFENDANTS AFFIDAVITS CAME FROM PERSONAL KNOWLEDGE

> "It is true that personal knowledge includes inferences...and therefore opinions. U.S. v. Giovannetti, 919 F2d 1223. 1226. But the inferences and opinions must be grounded in observation or other first hand personal experiences." Visser v. Packer, 927 F2d 655 (7th Cir. 19).

> "To survive summary judgment, (he) should have provided the district court... affidavits from individuals with personal knowledge." Reed v. Amax, 971 F2d 1295 (7th Cir. 1992).

> "...the inferences and

opinions must be grounded in observation or other first hand personal experiences." Visser v. Packer 927 F2d 655 (7th Cir. 1991).

"...affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Resolution Trust Corp. v. Juergens, 965 F2d, 149 (7th Cir. 1992)

Affidavits were submitted by the three original Trustees and Templetons. Templetons were familiar with the Trust Agreement since they authored the document. The Trustees were familiar with the Trust Agreement since they had read it, discussed it, and understood the provisions as well as the responsibilities they were acquiring as Trustees. The statement made in the affidavits concerning the Trust Agreement were made on the basis of personal observation and knowledge and the Trustees

and Templetons were competent to testify as to the contents of the Trust Agreement.

Defendants objected that they had not been afforded the opportunity for a hearing of any kind, when they could explain to the courts that the courts were proceeding to make decisions on the basis of inaccurate facts, and to cross examine Officer Forsgren as to the basis for his statements in his declaration.

> "In short, there is sufficient evidence supporting the claimed factual dispute...to require a jury or judge to resolve the parties' differing versions of the truth at trial." Covalt v. Carey, 950 F2d 481 (7th Cir. 1991).

There is sufficient evidence in this instant case supporting the claimed facts in dispute, to require a jury to resolve the parties' differing versions of the truth.

> "...for a 'fair and just disposition of a claim' the

party opposing summary judgment must have a reasonable opportunity to demonstrate that there is a genuine issue of material fact. Ross. 777 F2d at 1219." Kincaid v. Vail, 969 F2d 594 (7th Cir. 1992)

"(Non-movant) raised adequate issues of fact to defeat (the) summary judgment motion, when he presents evidentiary material which, if reduced to admissible evidence, may allow him to carry his burden of proof." Reed v. Amax, 9761 F2d 1295 (7th Cir. 1992).

Defendants raised adequate issues of fact to defeat the summary judgment motion, in their affidavits.

AFFIDAVITS OF TRUSTEES AND TEMPLETONS (See Appendix)

"It is responsibility of parties opposing motion for summary judgment to set forth specific facts demonstrating that there is genuine issue for trial." Bank Leumi v. Lee, 928 F2d 232 (7th Cir. 1991).

The defendants' affidavits stated specific facts demonstrating that there is genuine issue for a jury trial. They stated that there were indeed

beneficiaries to the Trust, and there was sufficient consideration listed in the Agreement.

> "...(non-movant) must demonstrate through specific evidence, that there remains a genuine issue of triable fact." Price v. Rochford, 947 F2d 829, 832 citing Celotex (7th Cir. 1991)

Defendants provided the lower courts with affidavits from individuals with personal knowledge of the facts in the case.

> "Nonmoving party must present affirmative evidence in order to defeat properly supported motion for summary judgment." Scherer v. Rockwell, 975 F 2d 356 (7th Cir. 1992).

Defendants' affidavits constituted affirmative evidence to defeat a motion for summary judgment.

"More than ample evidence existed for a good faith determination that Scherer, who has produced no evidence to the contrary but only his bare denials...Indeed the non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment...but the non-moving party's own affidavit or deposition will constitute such affirmative evidence to defeat a summary judgment motion even if it includes only bare denials. See Gatlin v. Jewel Food, 699 F. Supp. 1266, 1268 (N.D.IL. 1988). The real question, therefore, is not whether Scherer presented more than his bare denials whether the evidence he presented was sufficient to create a genuine issue of fact for a jury." Scherer v. Rockwell, 975 F2d; 356 (7th Cir. 1992). (Emphasis added).

The real question in the instant case, then, is not whether defendants presented more than bare denials but whether the evidence they presented was sufficient to create a genuine issue of fact for a jury. Defendants' personal knowledge of the contents of the Trust

Agreement included inferences, and their opinions do no damage to their affidavits, as the 7th Circuit stated:.

> "It is true that personal knowledge includes inferences...and therefore opinions. U.S. v. Giovannetti, 919 F2d, 1223, 1226." Visser v. Packer, 927 F2d 655 (7th Cir. 1991).

Defendants affidavits constituted affirmative evidence to defeat summary judgment.

DETERMINATIONS OF FACT MADE BY THE LOWER COURTS, WHICH SHOULD MORE PROPERLY BE LEFT FOR A JURY TO DECIDE

The lower courts decided that the Trust did not constitute a legitimate Trust, despite defendants' affirming that it did.

The lower courts decided that the Trust was only 2 pages in length, despite defendants' statements to the contrary and their offer of the entire Trust Agreement for an in-camera inspection.

The lower courts decided that the Trust had no beneficiaries or sufficient consideration, despite defendants' statements to the contrary in their affidavits.

The lower courts decided fraudulent intent, which even the district court admitted is usually left as a fact for a jury.

The lower courts decided that Templetons retained control over the property, despite defendants' statements that from the date of the transfer, Templetons rented the property from the Trust and that a bonafide landlord/tenant relationship existed between them.

The lower courts decided that Templetons owned no other property of significant value at the time of the transfer, despite Templetons' statements in the pleadings of the other properties

they owned at the time of the transfer.

Defendants object to the granting of summary judgment, since the lower courts made credibility determinations, and weighed evidence, and drew legitimate inferences from the facts, which are functions of a jury, not a judge.

> "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge..." Anderson v. Liberty Lobby." Covalt v. Carey, 950 F2d 481 (7th Cir. 1991).

The lower courts, in this instant case, decided issues of fact, an obvious jury function.

> "Caution is required in granting summary judgment especially under a statue that allows for trial by jury..." Visser v. Packer 927 F2d 655 (7th Cir. 1991)

The lower courts exercised no caution in granting summary judgment under a

statute which allows for trial by jury.

Defendants have requested a jury trial.

> "When an inferior court is required to perform an act of a ministerial character or to perform an act dictated by a clear legal duty, such as granting a request for trial by jury, an action for mandate is proper to compel the performance of such act. Gillespie v. Gilmore 159 Ind. App. 449, 307 N. E. 2d 480, 483 (1972). Emphasis added. Kincaid v. Vail, 969 F2d 594 (7th Cir. 1992)

Defendants were entitled to a jury trial on the facts in dispute.

> The central consideration should be whether the claims of the pro se litigants have had a 'fair and meaningful consideration.' Madyun v. Thompson 657 F 2d 868, 876 (7th Cir. 1981).

CONSTITUTION GUARANTEES RIGHT TO JURY TRIAL

The fifth and seventh amendments to the United States Constitution, declare:

> "...nor be deprived of...property without due process of law."
>
> "...the right of trial by jury

shall be preserved..."

The granting of summary judgment in this case denied those guarantees to defendants.

AGENT FORSGREN'S AFFIDAVIT

The District Court stated that the IRS's agent Forsgren's "Declaration:"

> "...adequately set forth the basis for his knowledge, and that he had relevant information to the proceedings because he is a representative of the IRS with knowledge of taxpayers' tax filings."

There was no documentation attached to agent Forsgren's declaration, except two pages from utility companies showing they were in Templetons' name, and his unsupported conclusions actually were either false or at best half-truths. Whether or not Templetons paid the utility bills does not show in any way that Templetons retained control over the

property since it is normal for tenants to pay utility bills.

Defendants' affidavits set forth "the basis for their knowledge," and they certainly "had relevant information to the proceedings" because they were a party to the Trust Agreement, with knowledge of its contents.

Yet the lower courts summarily tossed aside defendants' affidavits and stated that they contained only legal conclusions, not accompanied by documentary evidence to support such conclusions, without suggesting their basis in fact.

The district court admitted that Forsgren's affidavit was "conclusory" when it stated:

> "Templetons properly may disagree with Officer Forsgren's conclusions..." (Emphasis added)

Officer Forsgren's declaration, and

defendants' affidavits were at least on a par with each other. Yet the courts rejected one and accepted the other. The District Court stated it did consider defendants' affidavits but "...found (the affidavits) to be of little import in the matters at issue." Given the fact that defendants' affidavits addressed the very matters which are at issue - whether the Trust Agreement lists beneficiaries and the consideration, to name two issues, - the court's statement is startling!!

Officer Forsgren's declaration stated that (1) he was the IRS agent who was assigned the responsibility for collecting Templetons taxes for 1979, (2) that Mrs. Templeton and the three trustees of the Trust were members of a particular group, (3) that Templetons continued to live in the property after the transfer, and (4) that he could find no other property of

marketable value Templetons owned at the time of the transfer.

To show his statements were either false or half-true, defendants state the following:

The lower court stated he was familiar with Templetons taxes, but he could find no other properties Templetons owned at the time of the transfer: YET other properties were listed on tax returns to the IRS, (which returns were exhibited in earlier pleadings by defendants); YET another property was visited in 1984 by agents of the IRS.

He stated Templetons continued to live in the property, and attached utility bills in Templetons' name: YET he failed to think that it is normal for a tenant to pay utility bills. After he discovered that the utility bills were being paid by Templetons, he stopped his investigation

there, relying on his own "conclusion" that the payment of utility bills by Templetons would somehow prove that Templetons had retained control over the property.

He stated that Mrs. Templeton and the three original trustees were members of the same group; YET even if this were true, it is of no significance. Why was it even broached? If they all went to the same church, would this point to fraud?

Officer Forsgren's declaration offers only "conclusions" which he hopes will prove fraud, but no facts strong enough to support summary judgment.

WHETHER A FEDERAL COURT HAS JURISDICTION TO VOID A CONTRACT MADE WITHIN THE TERRITORIAL JURISDICTION OF THE STATE OF INDIANA.

The property in question is not within the territorial jurisdiction or authority of the United States, nor the

subject matter jurisdiction or authority of the District Court. Defendants quote the Indiana Constitution, Art. I, Sec. 24; The United States Constitution Art. I, Sec. 10(1); and the United States Constitution, Tenth Amendment:

Indiana Constitution, Art. I, Sec. 24:

> "No...law impairing the obligation of contracts shall ever be passed."

The United States Constitution, Art. I, sec. 10(1):

> "No state shall...pass any...law impairing the obligation of contracts."

The United States Constitution, Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The District Court, in its Order

dated March 4, 1991, page 9, line 10, states:

> "Mr. Venegoni argues that the governments of the separate states may not interfere with individuals' obligations in contracts and, accordingly, the federal government is prohibited from such interference pursuant to the Tenth Amendment. Mr. Venegoni's assertions find no basis in federal or state law." (Emphasis added)

The district court has confusingly misstated what defendant said. What defendant said was:

> "Accordingly, no delegation of power by the Constitution for the federal government to do that which the states are prohibited from doing in regard to contracts, is given or allowed. The federal government (sic - should have been 'The federal constitution') recognizes the sanctity of contracts as well, by prohibiting the states from impairing the obligation of contracts. As per the Tenth Amendment, the federal government (sic - should have been 'the Federal Constitution) cannot do that which it prohibits the states from doing

in reference to contracts." (Emphasis added)

The district courts statement claims that defendant said that the governments of the states may not interfere with contracts between individuals. This is not what Venegoni stated. Venegoni agrees that <u>when there is a dispute between parties to a contract</u>, the state may, when requested by one of the parties, certainly interfere, to determine the meaning or enforceability of the contract. But in this instant case, the parties who made the contract are <u>not</u> in dispute.

Defendant pointed out that if the State is forbidden to interfere with a lawful contract made within the territorial jurisdiction of a state, when the parties are not in dispute, then the federal government is most certainly forbidden to interfere.

The district court

continued to "explain:"

> "Both state and federal courts have been called upon to determine the meaning or enforceability of contracts between individual parties in Indiana...(Cites omitted)...In these cases, the court's role was to assist the parties in carrying out the contractual provisions (or determining whether in fact a contract exists) and not to interfere with such parties' constitutional right to contract."

While it may be true, as the district court stated, that federal courts have been called upon to address the issues stated by the district court, a federal court cannot void a contract made within the territorial jurisdiction of the State of Indiana, especially where there is no dispute between the parties and where the court has not been asked to interfere by one of the parties to the contract.

The district court does not have the authority to void this contract between

Templetons and the Trustee of The Seven Eighteen Trust. The contract still exists and is still agreed upon by the parties to the contract.

The government's Appellees Brief (Pg. 31 line 15) cited Bertsch v. McBride, 58 F.2d 799, 801 (6th Cir. 1932), and American S.S. Co. v. Wickwire Spencer Steel, 42 F.2d 86, 894-95 (W.D.N.Y. 1930) as having said:

> "The impairment of contract argument has been rejected in the specific context of creditors challenging fraudulent conveyances."

The Bertsch court upheld a State statute governing fraudulent conveyances, but no-where addressed the instant issue of the federal government's prohibition by the Tenth Amendment of voiding a contract made in a State.

The American S.S.Co. court also upheld State law and said

> "..it clearly puts upon the creditors the burden of proving that the conveyance or agreement was in fact actually tainted."

Neither case which the government cited, touches on the subject issue nor says what the government says it says.

The Tenth Amendment to the U.S. Constitution is quite clear, concerning the powers delegated to the federal government.

It is well settled that the Supreme Court is the only constitutionally mandated court. All other inferior courts are specifically limited in their jurisdiction and authority by legislative enactment.

It is equally well settled in law and reiterated by the Supreme Court that all legislative enactments of Congress are confined to the territorial limits of the United States.

> A "...canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." U.S. v. Spelar, 338 U.S. 217 at 222 (1949).

No statute allows the district court to extend or expand its authority outside its statutorily designated sphere, the District Courts statement notwithstanding.

The contractual situation between the Templetons and The Seven Eighteen Trust (set up under Indiana common law) exists outside the territorial jurisdiction of the United States and is therefore not within the purview of decision by the federal district court.

There is no dispute between the Templetons and the Trustee, in relation to this contract. What we have here is the United States government attempting to interfere with a contract made in the State of Indiana between two agreeable

parties when it has been forbidden to do so by the Constitution.

> "...jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties." American Fire & Cas. Co. vs. Finn, 341 U.S. 6, 17, 18. 71 S.Ct. 534, 542; 95 L.Ed. 701 (1951).

> "Generally, a plaintiff's allegations of jurisdiction are sufficient, but when they are questioned, as in this case, the burden is on the plaintiff to prove jurisdiction. McNutt v. General Motors Acctp. Corp. 298 U.S. 178; 56 S.Ct. 780; 80 L.Ed. 1135 (1936).

In this case no proof has been entered or even proffered that would make even a prima facie showing that jurisdiction exists for federal authority to void a contract made outside federal jurisdiction, when there is no dispute between the contracting parties.

CONCLUSION: For the three reasons stated, defendants are required to have their

right to jury trial preserved.

WHEREFORE this court is respectfully urged to enter an order granting defendants' David and Rachel Templeton, and Trustee Michael Venegoni, petition for a writ of certiorari to the 7th Circuit Court of Appeals.

Respectfully submitted,

Date: DECEMBER 10, 1992

David Templeton
David Templeton

Rachel Templeton
Rachel Templeton

Michael Venegoni, Trustee
Michael Venegoni, Trustee

OPINIONS OF THE COURTS BELOW

The opinion of the District Court, which was adopted by the Seventh Circuit Court of Appeals, which opinion is herein sought to be reviewed, was rendered on March 4, 1991.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA,)
Plaintiff)
DAVID JAMES TEMPLETON, et al.)
Defendants)

MEMORANDUM AND ORDER

This action concerns the ownership of certain real property located at 718 Pontiac Street, Rochester, Indiana ("the Rochester property"). The United States contends that the Rochester property is owned by two individuals, defendants Rachel and David Templeton, who owe taxes, penalties, and interest to the United States and that the Internal Revenue Service should be permitted to foreclose on the Rochester property to satisfy those

tax debts. All defendants challenge the government's ability to make the tax assessment against the Templetons and to use the Rochester property to satisfy any judgment against those defendants.

This cause is now before the court on both dispositive and procedural motions. These matters have been fully briefed and are ripe for ruling by this court.

Factual Background

David and Rachel Templeton received title to the Rochester property in November, 1967. In November, 1982, the Templetons executed a trust agreement for the transfer of the Rochester property to the Seven Eighteen Trust ("the Trust"). Following the Templetons' alleged transfer of the Rochester property, they continued to reside at that property and remained liable for utility bills of that property. In fact, the Rochester property's address

is the Templetons' address of record in this action. The record does not reveal that the Templetons owned any other real estate for either business or personal use at the time of the execution of the trust agreement or the IRS's tax assessment.1

The trust agreement for transfer of the Rochester property denotes consideration in the amount of one dollar and "other valuable consideration". As it appears in this court's record, the trust agreement is two pages in length and names no beneficiaries to the Trust.2 The

1 In their response to the government's summary judgment motion, the Templetons state that they owned several business and real properties during this time, but they have not documented such ownership.

2 The Templetons contend that the original trust agreement named beneficiaries and the IRS submission is only a portion of that document. The Templetons have not come forward with their version of the trust agreement. Moreover, that trust agreement submitted by the IRS has pages numbered in sequence and bears the signatures of the Templetons and trustees

original named trustees of the Trust were Peter W. Terpstra, Sr., Victor D. McMahan, and Max E. Beer, all named defendants in this action. Mr. Terpstra, Mr. Beer, and Mr. McMahan are all members of an organization known as the Patriots for Liberty.3 of which Rachel Templeton is also a member. Defendant Michael Venegoni 4 has replaced Mr. Beer as a trustee of the Trust.

On April 15, 1980, David and Rachel Templeton timely filed their 1979 federal income tax return with the Internal Revenue Service. Four years later, the

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on the last page.

3 This factual information is derived from the Declaration of Officer Forsgren. The Templetons do not dispute the trustees' (or their own) membership in this organization, but contest the significance of such information to this action.

4 Mr. Venegoni has been referred to by the names Michael and Tim in this record. The court assumes that both names refer to the same person named in this cause.

IRS made an assessment against the Templetons for the 1979 tax year in the amount of $43,792.72 in taxes, $2,189.64 in negligence penalties, and $28,789.69 in interest. The Templetons have refused to pay this assessment. As of March 3, 1989, the unpaid balance of the IRS's tax assessment against the Templetons on their 1979 return was $73,034.10.

The Parties' Positions

The United States has moved for summary judgment against all defendants. The government seeks to reduce those tax assessments against defendants David and Rachel Templeton to judgment and to foreclose on the Rochester property. The United States also asks this court to determine that the Templetons are the legal owners of the Rochester property because their transfer of that real estate to the Trust was void, either because no

valid trust was created or because the transfer was a fraudulent conveyance.

In support of its summary judgment motion, the United States has submitted the declaration of IRS Revenue Officer Thomas Forsgren; a Form 4340 certificate of assessments and payments for David and Rachel Templeton; a copy of the warranty deed transferring the Rochester property to the Templetons in November, 1967; a copy of the warranty deed (allegedly) transferring the Rochester property to the Trust in November, 1982; a copy of the trust agreement for the Trust; and a copy of a billing record for utilities provided to the Rochester property.

The Templetons have several responses to the government's summary judgment motion. First, they contend that the IRS has failed to prove sufficiently that an assessment was made against them for the

1979 tax year and, therefore, the tax liens attached to the Rochester property should be voided. Specifically, the Templetons argue that the Form 4340 submitted as evidence of the April, 1984 assessment is a computer-generated document that is insufficient proof of an assessment.

Relying on this same position, the Templetons seek to dismiss the government's complaint for failure to make an assessment against them. The Templetons also move to strike the Form 4340 from the record, to strike the affidavit of IRS Officer Forsgren, and for a more definite statement and/or a motion to strike portions of the government's brief in support of its motion for summary judgment.

In further response, the Templetons allege that the Trust was a valid trust

under Indiana law. In support of their responses, the Templetons submitted their own affidavits 5 and various documents outlining the IRS's procedures in making assessments for delinquent taxes.

Trustee Michael Venegoni has responded to the government's motion with essentially the same positions asserted by the Templetons and also makes two additional responses: (1) this court has no jurisdiction to void a contract made in Indiana, and (2) this action was commenced more than six years after execution of the Trust and, therefore, is barred by Indiana's statute of limitations for challenging a transfer of real property. Mr. Venegoni submits the affidavits of Max Beer, Peter Terpstra, Sr., and Victor

5 The Templetons' affidavits consist mostly of legal conclusions and are not accompanied by documentary evidence to support such conclusions.

McMahan in response to the government's motion.6

Mr. Venegoni also seeks dismissal of the complaint for want of jurisdiction and on statute of limitations grounds. The court has stayed briefing of these motions pending ruling on the government's motion for summary judgment. The determinations in this memorandum and order, however, indicate that Mr. Venegoni's motions should be denied.

The Templetons' Motions To Dismiss and Procedural Motions

The Templetons have filed three procedural motions and a motion to dismiss the complaint based on theories discussed

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6 These affidavits of the original trustees of the Seven Eighteenth (sic) Trust are identical in both form and content. The affidavits recite various legal conclusions without suggesting their basis in fact or attachment of supporting documentation.

in those procedural motions. The Templetons initially moved to strike the Form 4340 certificate of assessments and to dismiss the complaint for failure of the IRS to validate the alleged assessment. Neither motion is well-taken.

The Templetons suggest that the government must produce the original Form 23C assessment to prove that the IRS assessed tax penalties against them in April, 1984. They contend that the IRS never made such an assessment and that they never received notice of that action.

Several courts have held that a Form 4340 submission is sufficient evidence of the making of an assessment to establish the government's prima facie case of tax liability. United States v. Chila, 871 F.2d 1015 (11th Cir.), cert. denied, 110 S.Ct. 498 (1989); United States v. Dixon, 672 F. Supp. 503, 506 (M.D. Ala. 1987);

G.M. Leasing Corp. v. United States, 514 F.2d 935, 941 (10th Cir. 1975), rev'd on other grounds, 429 U.S. 338 (1977). Once the IRS has shown evidence of an assessment, the burden shifts to the taxpayer to refute the validity of the tax liability. Helvering v. Taylor, 293 U.S. 507, 515 (1935); Calderone v. United States, 799 F.2d 254, 258 (6th Cir. 1986); Anastasato v. Commissioner, 794 F.2d 884, 886 (3rd Cir. 1986); Avco Delta Corp. v. United States, 540 F.2d 258 (7th Cir. 1976), cert. denied, 429 U.S. 1040 (1977).

Apart from their own conclusions, the Templetons have come forward with neither evidence nor legal authority to challenge the validity of the Form 4340 certificate. Moreover, in response to the Templetons' motions, the government submitted further documentation of the assessment in question, including the Form 23C, which

the Templetons admit is the proper documentation of an assessment, and a copy of the notice of tax assessment mailed to the Templetons at the Rochester property on April 25, 1984. The Templetons have not responded to this additional documentation.

Based on sufficient evidence in the record demonstrating that a tax assessment was issued against the Templetons on April 25, 1984, the court must deny the Templetons' motion to dismiss and motion to strike Form 4340.

The Templetons move to strike Officer Forsgren's declaration in support of the government's summary judgment motion on the grounds that the document is "insufficient", "immaterial, impertinent and scandalous". Quite generally, the Templetons' motion to strike the declaration of Officer Forsgren is based

on the assertion that the IRS made no tax assessment against the Templetons in April, 1984. The Templetons further fault Officer Forsgren's declaration for asserting statements which these defendants challenge in response to summary judgment.

However, the mere fact that the Templetons disagree with Officer Forsgren's statements does not warrant striking those statements from the record. Officer Forsgren's affidavit adequately states the basis for his knowledge. Moreover, Officer Forsgren as an IRS representative with knowledge of the Templetons' tax filings, has information pertinent to these proceedings. The Templetons properly may disagree with Officer Forsgren's conclusions, but the mere existence of that dispute does not support a motion to strike under Federal

Rule of Civil Procedure 12(f). Accordingly, the Templetons' motion to strike Officer Forsgren's declaration will be denied.

The Templetons finally move for a more definite statement and/or to strike certain portions of the memorandum in support of the government's motion for summary judgment. The section in question asks this court to determine that "the Templetons are the legal owners of the property because the transfer was void because no valid trust was created or, alternatively, that it was void because it was a fraudulent conveyance." In requesting this relief, the government points out in a footnote that the complaint in this case does not explicitly ask for such a determination, but asks that the court conform the original pleadings to the relief sought on summary

judgment.

The Templetons ask this court to strike a portion of the government's brief which merely sets forth the full nature of relief sought in this action. The Templetons plainly understand the requested relief, as they have responded asserting the validity of the trust agreement and questioning the government's claim of fraud. A more definite statement of the government's position is unnecessary.

The court does not have before it a motion to amend the pleadings with the above statement and, accordingly, will not grant such relief. However, the mere fact that the government has sought to clarify the nature of relief sought on summary judgment presents no cause to strike that discussion. The Templetons present no grounds for relief under Federal Rules of

Civil Procedure. 12(f).

Mr. Venegoni's Jurisdictional Challenges

In response to the government's motion for summary judgment, Mr. Venegoni raises the same issues as in his motions to dismiss. First, he argues that the court lacks jurisdiction "to void a contract made within the territorial jurisdiction of the State of Indiana", citing Article 1, Section 10 of the United States Constitution, the Tenth Amendment to the United States Constitution, and Article I. Section 24 of the Indiana Constitution. Mr. Venegoni argues that the governments of the separate states may not interfere with individuals' obligations in contracts and, accordingly, the federal government is prohibited from such interference pursuant to the Tenth Amendment. Mr. Venegoni's assertions find no basis in federal or state law.

Both state and federal courts have been called upon to determine the meaning or enforceability of contracts between individual parties in Indiana. Sheldon v. Munford, Inc., 660 F. Supp. 130 (N.D. Ind. 1987); Barnes Group, Inc.v. O'Brien, 591 F. Supp. 454 (N.D. Ind. 1984); Neterer v. Slabaugh, 548 N.E.2d 832 (Ind. App. 1990); Fields v. Cummins Employees Federal Credit Union, 540 N.E. 2d 631 (Ind. App. 1989); Bochnowski v. Peoples Federal Savings & Loan Ass'n, 530 N.E. 2d 125 (Ind. App. 1988). In these cases, the court's role was to assist the parties in carrying out the contractual provisions (or determining whether in fact a contract exists) and not to interfere with such parties' constitutional right to contract. IKO Equipment Co. v. C & G Coal Co., Inc., 863 F.2d 541 (7th Cir. 1988); Caporale v. Mar Les, Inc., 656 F.2d 242 (7th Cir. 1981);

Ford Motor Credit Co. v. Garner, 688 F. Supp. 435 (N.D. Ind. 1988).

Mr. Venegoni's interpretation of the Tenth Amendment and Article I of the Constitution has not been adopted by the federal and state judiciaries. The claim that this court lacks jurisdiction has no basis in law.

Mr. Venegoni also asserts that the Indiana statute of limitations on actions alleging fraud bars the government's complaint. IND. CODE 34-1-2-1(1). Federal courts apply state substantive law in actions to set aside a fraudulent conveyance and foreclose on a federal tax lien, Commissioner v. Stern, 357 U.S. 39, 42-45 (1958), but do not apply the state's statute of limitations, United States v. Fernon, 640 F.2d 609 (5th Cir. 1981). Accordingly, Indiana's statute of limitations presents no bar to this

action.

The court will address the remainder of Mr. Venegoni's positions on summary judgment along with those similarly raised by the Templetons.

Standard of Review on Summary Judgment

A party seeking summary judgment must demonstrate that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Certain Underwriters of Lloyd's v. General Accident Ins. Co. of America. 909 F.2d 228, 231 (7th Cir. 1990). If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute. Lujan v. National Wildlife Federation. 110 S.Ct. 3177, 3186 (1990); Celotex Corp. v.

Catrett, 477 U.S. 317 (1986); Sims v. Mulcahy, 902 F. 2d 524, 540 (7th Cir.), cert. denied, 111 S.Ct. 249 (1990). If he fails to do so, summary judgment is proper. Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 (7th Cir. 1990); Tatalovich v. City of Superior, 904 F.2d 1135, 1142 (7th Cir. 1990). A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent. Harbor House Condominium Ass'n v. Massachusetts Bay Ins. Co., 915 F.2d 316, 320 (7th Cir. 1990); Hines v. British Steel Corp., 907 F.2d 726, 728 (7th Cir. 1990). Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).

The parties cannot rest on mere allegations in the pleadings, Bay State Milling Co. vs. Martin, 916 F.2d 1221, 1225 (7th Cir. 1990), or upon conclusory allegations in affidavits. Mestayer v. Wisconsin Physicians Service Ins. Corp., 905 F.2d 1077, 1079 (7th Cir. 1990). The court must draw any permissible inferences from the materials before it in favor of the non-moving party, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Illinois Bell Telephone Co. v. Hanes and Co., Inc., 905 F.2d 1081, 1087 (7th Cir. 1990), as long as the inferences are reasonable. Renovitch v. Kaufman, 905 F.2d 1040, 1044 (7th Cir. 1990). The non-moving party must show that the disputed fact is material, or outcome-determinative, under applicable law. Johnson v. Pelker, 891 F.2d 136, 138 (7th Cir. 1989).

Even on an issue of intent, summary judgment is proper if the party with the burden at trial presents no indication of the necessary motive or intent. Illinois Bell Telephone Co., 905 F.2d at 1087; Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307 (7th Cir. 1989).

The court will address the government's motion with the above standards in mind. Discussion must focus on whether the Templetons are the owners of the Rochester property. As discussed above, the United States made a tax assessment against the Templetons on April 25, 1984. The Templetons have not refuted the presumption that such an assessment is valid. Accordingly the sole remaining issue is whether the government properly may place a tax lien on the Rochester property, an issue the court resolves in favor of the IRS.

The IRS's Summary Judgment Motion and the Defendants' Responses

The United States argues that the Templetons are the equitable owners of the Rochester property and, therefore, the real estate should be used to satisfy their tax liability. The government asserts two positions in support of this theory. First, the Templetons' transfer of the Rochester property in trust was not valid under the laws of Indiana. The government contends that the Templetons failed to satisfy all necessary ingredients to establish a valid trust with respect to the Trust. Specifically, the government notes that the trust agreement fails to either name the Trust's beneficiaries or demonstrate that valuable consideration was given in the transfer of the Rochester property to the Trust.

The government further asserts that

even if the trust agreement was valid when executed, the transfer of the Rochester property to that Trust was a fraudulent conveyance. The United States points out that the Templetons continued to reside at the Rochester property (and continue to do so today) and never received any consideration for their relinquishment of that property to the Trust. Asserting principles of Indiana law, the government argues that the court should set aside the Templetons' conveyance of the Rochester property.

In response to the summary judgment motion, the Templetons and Mr. Venegoni argue that the trust agreement was properly created under Indiana law. They contend that the agreement was executed for valuable consideration and that beneficiaries were named in the original agreement. The defendants further argue

that the Templetons have not acted as the owners of the Rochester property since the conveyance to the Trust. They also suggest that there is no evidence of fraud in the conveyance of that property.

The fundamental characteristics that distinguish a trust from other legal relationships are the existence of a fiduciary relationship and the holding of title to property by one person for the benefit of another. Snouffer v. Peoples Trust and Savings Co., 140 Ind. App. 491, 212 N.E. 2d 165 (1966); Tait v. Anderson Banking Company, 171 F. Supp. 3 (S.D.Ind. 1959); In re Trusteeship of Creech, 130 Ind. App. 611, 159 N.E.2d 291 (1959). Indiana law provides the following formal requirements to establish a trust:

> (a) A trust in either real or personal property is enforceable only if there is written evidence of its terms bearing the signature of the

settlor or his authorized agent.

> (b) Except as required in the applicable probate law for the execution of wills, no formal language is required to create a trust, but its terms must be sufficiently definite so that the trust property, the identity of the trustee, the nature of the trustee's interest, the identity of the beneficiary, the nature of the beneficiary's interest and the purpose of the trust may be ascertained with reasonable certainty.

IND. CODE 30-4-2-1; see also Pavy v. Peoples Bank & Trust Co., 135 Ind. App. 647, 195 N.E.2d 862 (1964).

The trust agreement establishing the Trust is incomplete in at least two respects. First, it fails to name that valuable consideration which was exchanged in the transaction. More importantly though, the trust agreement does not name the beneficiaries of the alleged Trust. The second omission is crucial in establishing the requisite fiduciary

relationship essential to a trust. While the Templetons suggest that beneficiaries were named in the trust agreement, they fail to come forward with evidence, as they must to meet their burden on this issue. The party asserting the existence of a trust has the burden of proof in establishing it. Webster v. Webster, 135 Ind. App. 53, 184 N.E. 2d 897 (1962); Mayfield v. Kansas City Life Ins. Co., 158 F.2d 331 (7th Cir. 1946), cert. denied, 67 S. Ct. 1352 (1947).

These omissions from the trust agreement might not, on their face, compel invalidation of the Trust. Generally, a court should construe a trust agreement in favor of validity. Meyer v. Northern Indiana Bank and Trust Co., 490 N.E.2d 400 (Ind. App. 1986); Hinds v. McNair, 413 N.E.2d 586 (Ind. App. 1980). Under Indiana law, though, a court has equitable

powers to invalidate a trust agreement when improperly executed or if circumstances surrounding its execution so warrant. IND. CODE 30-4-3-30; Matter of Walz. 423 N.E.2d 729 (Ind. App. 1981); Apple v. Apple. 140 Ind. App. 529, 274 N.E.2d 402 (1971). The existence of fraud in the execution of a trust justifies invalidation of that fiduciary relationship. Ralph v. George. 78 Ind. 491, 136 N.E. 44 (1922); Ewing v. Smith. 132 Ind. 205, 31 N.E. 464 (1892). The two material omissions in the trust agreement, combined with significant evidence of fraud in this transaction, compel this court to invalidate the Templetons' attempted transfer of the Rochester property.

Indiana law on fraudulent conveyances is well-established in its principles. IND CODE 32-2-1-14 et seq. Fraudulent

intent generally is a question of fact, and no conveyance or charge will be adjudged fraudulent against creditors solely on the grounds that it was not founded on valuable consideration. U.S. Marketing Concepts v. Don Jacobs, 547 N.E.2d 892 (Ind. App. 1989). Other factors must be considered. Purple v. Farrington, 119 Ind. 164, 21 N.E. 543 (1889); Pence v. Rhonemus, 58 Ind. 268, 108 N.E. 129 (1915). The character of a sale or transfer of property must be judged by the circumstances existing at the time of the conveyance and not by subsequent events having no actual connection with the transaction. Stamper v. Stamper, 227 Ind. 15, 83 N.E.2d 184 (1949); Deming Hotel Co. v. Sisson, 216 Ind. 587, 24 N.E.2d 912 (1940); Ray v. Simons, 76 Ind. 150 (1881).

While the determination of whether a

conveyance was fraudulent involves the consideration of various elements and factors, certain circumstances so frequently indicate transfers to defraud creditors that they are recognized as indicia or "badges of fraud", Arnold v. Dirrim, 398 N.E.2d 442 (Ind. App. 1979); Cook v. Ball, 144 F.2d 423 (7th Cir. 1944), cert. denied, 323 U.S. 761 (1945), including: a debtor's transfer of property during pendency of suit; transfer of property that renders debtor insolvent or greatly reduces his estate; a series of contemporaneous transactions which strip the debtor of all property available for execution; secret or hurried transactions not in the usual mode of doing business; a transaction conducted in a manner different from customary methods; transactions whereby the debtor retains benefits over transferred property; little

or no consideration in return for transfer; and transfer of property between family members. U.S. Marketing Concepts v. Don Jacobs, 547 N.E.2d at 894; Jones v. Central National Bank of St. Johns, 547 N.E.2d 887 (Ind. App. 1989).

The Templetons' conduct evidences a clear intent to defraud the Internal Revenue Service in establishing the Trust and conveying their real property to that entity. As of the date of the alleged transfer, the Templetons had filed a deficient income tax statement. When the Trust was executed in November, 1982, the IRS was in the process of investigating the Templetons' 1979 tax return. Therefore, the Templetons attempted to relieve themselves of the ownership of the Rochester property during the time period when the IRS was establishing their tax liability.

The execution of the trust agreement also reeks of fraud. The Templetons sought no sizeable amount from the Trust in exchange for conveying their real property and continued to reside at that residence, paying the utility bills incurred there. The Templetons never named beneficiaries of the Trust or provided for the means of providing for such beneficiaries. Additionally, in establishing the Trust, the Templetons named three co-members of the Patriots for Liberty. All of these facts are contrary to the normal practice used in setting up a trust. Moreover, even after the alleged transfer of the Rochester property, the Templetons have continued to afford themselves of the benefit of residing there.

Evidence in the record indicates that the Templetons owned no other real estate

or other significant property when the Trust was established. While the Templetons dispute Officer Forsgren's statement on this point, they have failed to come forward with evidence to the contrary. Indeed, had the Templetons owned other property, the IRS would surely have attempted to place tax lien on that property.

The determination of the existence of fraud is normally a question of fact. IND CODE 32-2-1-18. However, the evidence in this matter, establishing certain badges of fraud, is not genuinely in dispute. The defendants have attempted to create a fact issue by disputing the evidence well-documented in the government's submissions. But neither the Templetons nor Mr. Venegoni have supported their positions with more than legal assertions posited in the affidavits of the

Templetons and the trustees. Such self-serving statements, without more, are insufficient to create genuine issues of fact in this matter.

Accordingly, this court now finds that there is no genuine issue of material fact that the November, 1982 attempt by the Templetons to convey the Rochester property to the Trust was fraudulent. That transaction, therefore, is void as a matter of law.

Conclusion

For those reasons stated above, the court now DENIES the following motions of defendants David and Rachel Templeton: the motion to dismiss, the motion to strike Form 4340, the motion to strike Officer Forsgren's Declaration, and the motion to strike and/or for a more definite statement. The court further GRANTS the United States of America's motion for

summary judgment and reduces to judgment that tax assessment made by the Internal Revenue Service against the Templetons on April 25, 1984. The court further finds that the Templetons are the equitable owners of the real property at 718 Pontiac Street, Rochester, Indiana, and that the United States is entitled to foreclose on that property in satisfaction of its tax assessment against the Templetons pursuant to 26 U.S.C. Sec. 6321. The court also finds that the motions to dismiss of defendant Michael Venegoni are now DENIED for the reasons stated in this order.

SO ORDERED.
ENTERED March 4, 1991

(S) Robert L. Miller, Jr., Judge
United States District Court

The denial by the District Court, of defendants' Motions To Alter Judgement, rendered on April 8, 1991.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CAUSE NO: S89-181 (RLM)

UNITED STATES OF AMERICA,)
Plaintiff)
DAVID JAMES TEMPLETON, et al.)
Defendants)

MEMORANDUM AND ORDER

Defendants David and Rachel Templeton and Trustee Michael Venegoni seek alteration or amendment of the court's March 4, 1991 order pursuant to Federal Rule of Civil Procedure 59. On March 4, the court granted the government's motion for summary judgment against all defendants and on all claims. The Templetons and Mr. Venegoni now claim that this court erred in the March 4 r'ling. For those reasons stated below, the court now denies both motions to alter and amend.

I.

Trustee Michael Venegoni contends that the court erred in its March 4 ruling in finding summary judgment in favor of the plaintiff in the face of disputed facts. Mr. Venegoni, however, does not identify which facts were in genuine dispute, and fails to demonstrate a failure to resolve any factual issues relevant to its decision to grant summary judgment to the government. Mr. Venegoni has not provided the court with a basis for the relief which he seeks.

Rule 59(e) may be the vehicle for challenging a court's decision on a dispositive motion, Northern Cheyenne Tribe v. Hodel, 8432 F.2d 224 (9th Cir. 1988); American Family Life Assurance Co. of Columbus v. Planned Marketing Associates, Inc., 389 F. supp. 1141 (W.D.Va. 1974), particularly if the

challenging party asserts an error of law or fact, A.D. Weiss Lithograph v. Illinois Adhesive Products, 705 F.2d 249, 250 (7th Cir. 1983); Huiff v. Metropolitan Life Insurance Co., 675 F.2d 119, 122 (6th Cir. 1982); Miller v. Leaverworth-Jefferson Electric Co-op, 653 F.2d 1378, 1380 (10th Cir. 1981). Mr. Venegoni, however, has presented no challenge to law or fact with the specificity required for this court to address his motion. That motion therefore must be denied.

II.

The Templetons have alleged eleven errors in this court's March 4 ruling. For those reasons stated below and those discussed in the March 4 order, the Templetons have not demonstrated that summary judgment in the government's favor is inappropriate in this case.

The Templetons first accuse the court

of ignoring their offer to present their version of the trust agreement at issue for an in camera review. However as noted before, the Templetons have never moved for the court's in camera inspection or produced any portion of that document in response to the defendant's (sic) motion for summary judgment. In responding to a summary judgment motion, the opponents must come forth with evidence to show what facts are in actual dispute. Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 3186 (1990); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Sims v. Mulcahy, 902 F.2d 524 (7th Cir), cert. denied, 111 S.Ct. 249 (1990). If he fails to do so, summary judgment is proper. Tatlovich v. City of Superior, 904 F.2d 1135, 1142 (7th Cir. 1990). It was the Templetons' failure to present the trust agreement, and not the court (sic) failure

to accept it, that resulted in that document's omission.

The Templetons next accuse the court of making factual findings the issue of fraud that properly should be decided by a jury; the Templetons raise this point several times throughout their brief. While the court recognizes here (as it did in the March 4 opinion, see pp. 15 & 16) that the issue of fraud is generally one of fact, the issue may present no genuine dispute if the evidence of fraud is overwhelming.

A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponents. Hines v. British Steel Corp., 907 F.2d 726, 728 (7th Cir. 1990). Summary Judgment should be granted if no reasonable jury could return a verdict for the motion's opponents. Anderson v.

Liberty Lobby, Inc., 477 U.S. 242 (1986); Baucher v. Eastern Indiana Production Credit Ass'n, 906 F.2d 332, 334 (7th Cir. 1990). Even on an issue of intent, summary judgment is proper if the party with the burden at trial presents no indication of the necessary motive or intent. McMillian v. Sventanoff, 878 F.2d 1989); Corrugated Paper Products, Inc. v. Longview Fibre Co., 868 F.2d 908, 914 (7th Cir. 1989).

Having found that the evidence strongly supported the fraudulent conveyance by the Templetons, the court properly resolved that issue at the summary judgment stage. No reasonable jury could have found in favor of the defendants; summary judgment in the plaintiff's favor was properly entered.

The Templetons next fault the court with two related omissions: failing to

address their concerns about the propriety of IRS Agent Frederick Williams' submission of Form 4340 and ignoring relevant case law on the validity of Form 23C to show tax liability. This court addressed those matters at pages six to eight of the March 4 order. The defendants raise no new arguments herein that require further discussion.

These defendants next argue that they had no opportunity to cross-examine IRS Agent Forsgren concerning his affidavit submitted to this court. The Templeton could have questioned that agent's conclusions, though, either by taking his deposition or by submitting contrary evidence. The record suggests that neither option was taken.

The Templetons further accuse the court of violating their right to due process in failing to hold oral argument

on the pending motions, but present no authority in support of that contention. The court refers the defendants to Northern District of Indiana rule 10 which recognizes that the granting of oral argument in a case is wholly within the court's discretion.

The Templetons also charge the court with error in disregarding affidavits filed in their behalf. However, even as the Templetons point out, the Court did consider those affidavits but found those affidavits to be of little import in the matters at issue. The Templetons have presented no new bases for the court to give greater import to those affidavits.

The Templetons next fault the court with addressing "other side issues which are neither relevant nor material to the issue at hand." However, the "side" issues to which they refer were relevant to the

issue of fraud, and found to be so by this court.

Finally, the Templetons accuse the court of inserting "other arguments from the court's own thinking" into the March 4 memorandum and order. The court agrees that it may have drawn its own conclusions based on facts in this case, but finds nothing in the Templetons' motion to suggest that such a practice was improper. These defendants generally argue that the court was biased in the March 4 order, but have not demonstrated that the rulings therein were sufficiently erroneous to suggest bias.

The Templetons' disappointment with this court's decision of March 4, 1991 is clear from their motion to alter and amend. However, that motion presents no grounds for altering the court's ruling.

Accordingly, for those reasons stated

above, the court now DENIES the motion to alter or amend of defendants David and Rachel Templeton and further DENIES the motion to alter or amend of Trustee Michael Venegoni.

SO ORDERED. ENTERED: April 8, 1991.

Robert L. Miller, Jr., Judge, United

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

DAVID J. TEMPLETON
RACHEL TEMPLETON
MICHAEL VENEGONI, TRUSTEE
In their own proper persons

APPELLANTS-DEFENDANTS
NO. 91-2032 91-2327

August 10, 1992

Before Hon. Frank H. Easterbrook Circuit Judge
Hon. Michale S. Kanne, Circuit Jugde
Hon Harlington Wood, Jr., Senior Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,
Nos. 91-2032 and 91-2327
v.
DAVID J. TEMPLETON and RACHEL TEMPLETON, MICHAEL VENEGONI, Trustee
Defendants-Appellants

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division. No. 89 C 181. Robert L. Miller, Judge.

ORDER

The district court granted the United States' motion for summary judgment, orddering that the Government may

foreclose on a piece of property fraudulently placed in a trust to defraud creditors while still equitably held by the Templetons. On this consolidated appeal, the Templetons and the trustee, Michael Venegoni, raise several challenges to the district court's decision. Our review of the briefs and the record leads us to conclude that the district court carefully considered all challenges when granting judgment to the United States We affirm for the reasons stated in the district court's thorough opinion, which is attached.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
September 22, 1992
Before Hon. Frank H. Easterbrook Circuit Judge
Hon. Michale S. Kanne, Circuit Jugde
Hon Harlington Wood, Jr., Senior Circuit Judge
UNITED STATES OF AMERICA, Plaintiff-Appellee,
Nos. 91-2032 and 91-2327
v.
DAVID J. TEMPLETON and RACHEL TEMPLETON, MICHAEL VENEGONI, Trustee
Defendants-Appellants

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division. No. 89 C 181. Robert L. Miller, Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above entitled cause, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

SUPPLEMENTAL AFFIDAVIT OF FORMER TRUSTEE
MAX A. BEER

(1) My name is Max A. Beer. I am competent to testify to matters concerning The Seven Eighteen Trust from November 1, 1982 to March 12, 1990.

(2) I was an original trustee of The Seven Eighteen Trust from November 1, 1982 to March 12, 1990.

(3) I had no intent to defraud anyone, nor to hinder or delay the creditors of anyone, when I became a trustee.

(4) I was not aware of any intent on the part of David J. or Rachel Templeton or the other two trustees or any other party, in setting up the Trust, to hinder, delay or defraud creditors.

(5) I was not aware of any facts that would even imply to me that there might be any fraud involved or intended by anyone involved in setting up the Trust.

(6) To my knowledge there was no suit

pending against David J. and/or Rachel Templeton at the time the Trust Agreement was signed.

(7) To my knowledge David J. and/or Rachel Templeton owed no taxes at the time of the transfer.

(8) I was not aware of any impediment or any claim of such, on the title of the property. To the contrary, I held a positive presumption that Templetons held the title free and clear at the time of the Trust Agreement.

(9) The purpose of the Trust was to hold the real property at 718 Pontiac Street, Rochester, Indiana, for the benefit of the beneficiaries.

(10) The beneficiaries were named in the Trust Agreement dated November 1, 1982.

(11) There was sufficient consideration tendered and accepted for the transfer of the property.

(12) I am not a member of the family of David J. and/or Rachel Templeton nor am I a relative by blood or marriage.

(13) I affirm that all of the above statments are true and correct to the berst of my knowledge and belief.

FUTHER AFFIANT SAYETH NOT.
Date: Jan. 21, 1991 (s) Max A. Beer

STATE OF INDIANA
COUNTY OF KOSC.
Subscribed and sworn to before me this
21st day of January, 1991.
(s) Tama Spiecher
Notary Public
Resident of Kosciusko County
My commission expires:
7/13/93

(Note: Affidavits from the three original Trustees were alike, so only one is exhibited here.)

(Note: Affidavits from David Templeton and Rachel Templeton were duplicates; only one is exhibited here.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
DAVID JAMES TEMPLETON, et al
Defendants

AFFIDAVIT

Comes now named defendant David James Templeton, to present his formal affidavit in denial of allegations of fact by plaintiff, as follows:

(1) My name is David James Templeton

(2) I am a named defendant in this action

(3) I am competent to testify to the facts stated in this affidavit

(4) I deny that I owe the amount allegedly assessed by plaintiff as claimed in the Complaint

(5) I deny that any amount was due and owing to The United States of America

under any set of circumstances, at the time of the conveyance of the property located at 718 Pontiac St., Rochester, IN.

(6) I deny that I possess any interest in any property owned by The Seven Eighteen Trust.

(7) I deny that the sale, transfer and conveyance of the property located at 718 Pontiac Street, Rochester, IN. to The Seven Eighteen Trust was made with the intent to hinder, delay, or defraud creditors.

(8) I affirm and declare under the laws of the United States of America that the above facts are true and correct to the best of my knowledge and belief

Respecfully submitted,

Date: November 7, 1990 (s)D.JamesTempleton
718 Pontiac Street
Rochester, IN 46975
(219)223-2355

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
DAVID JAMES TEMPLETON, et al
Defendants

AFFIDAVIT

I, Rachel Templeton, state the following:

(1) That I am a named defendant in the above action and that I am competent to testify to matters involved in this action. That David James Templeton, also a named defendant, is my husband of 34 years.

(2) That on or about April 15, 1980, my husband an I submitted a joint federal income tax "return" to the IRS for the year 1979.

(3) That on November 1, 1982, a Trust Agreement was signed by my husband and myself, setting forth the identity of the

trustees, the nature of the trustees' interest, the identity of the beneficiaries, the nature of the beneficiaries' interest and the purpose of the Trust.

(4) That my husband and I intended that the Trust Agreement would transfer, by warranty deed, the property at 718 Pontiac Street, Rochester, Indiana, to The Seven Eighteen Trust by virtue of contract.

(5) That on November 29, 1982, the first introductory pages and the last signature pages of the Trust Agreement plus the warranty deed, were recorded in the local courthouse.

(6) That on or about February 3, 1983, without any previous notice being received by us, my husband and I received a "Notice of Deficiency" from the IRS for the year 1979, disallowing all deductions on the "return" we filed, showing an amount

allegedly owed to the IRS.

(7) That on or about April 25, 1984, my husband and I received a letter claiming to be a "Notice of Jeopardy Assessment" and stating that a "Jeopardy Assessment" had been approved.

(8) That my husband and I have never received an actual assessment document, signed by a duly authorized assessment officer, as required by Internal Revenue Code Sec. 6203 and its regulations. I have made diligent efforts to obtain this assessment document but those efforts proved futile.

(9) That my husband and I had no concept at the time of the transfer that the IRS would disallow all statutory deductions merely because we claimed our right to be secure in our papers and effects.

(10) That the property at 718 Pontiac Street, Rochester, Indiana, was not the

only property of any commercial value held in my husband's or my name or both of our names, at the time of the Trust Agreement.

(11) That my husband and I have no right, title or interest in the property at 718 Pontiac Street, Rochester, Indiana nor did my husband or I or the two of us together retain any beneficial interest in the property after the signing of the Trust Agreement.

(12) That my husband or I or the two of us together are not the legal owners of the property.

(13) That there was no suit pending against my husband or myself or the two of us together, at the time of the Trust Agreement.

(14) That no judgment existed against my husband or myself or the two of us together, at the time of the signing of the Trust Agreement.

(15) That the transfer of the property did not leave my husband and I or the two of us together, insolvent.

(16) That the transfer did not strip my husband or I or the two of us together, of all property subject to execution.

(17) That the transfer was made for sufficient and adequate consideration.

(18) That the transfer was not between members of the same family.

(19) That at the time of the Trust Agreement, no "assessment" had been made or even purported, that established an amount due and owing by myself or my husband, to the Internal Revenue Service.

(20) That all of the above statements are true and correct to the best of my knowledge and belief.

Date: December 28,1990 (s)Rachel Templeton
718 Pontiac Street
Rochester, IN 46975
(219)223-2355

Notary Jurat

State of Indiana)SS
County of Fulton)

Before me the undersigned Notary Public, apeared Rachel Templeton, known to me to be that person, and signed the above document on the 28th day of December, 1990.

(s) Gwen L. Hornstein Mycommission expires
Resident of Fulton Co Dec. 25, 1992

Certificate of Service

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon counsel of record for all parties at interest in this cause by placing same in the United State mail addressed to said counsel at his office. This the 8th day of January, 1991.
(s) Rachel Templeton

Supreme Court, U.S.
FILED
FEB 17 1993
OFFICE OF THE CLERK

No. 92-1033

In the Supreme Court of the United States

OCTOBER TERM, 1992

DAVID JAMES TEMPLETON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

CHARLES E. BROOKHART
S. ROBERT LYONS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Indiana statute of limitations for commencing actions to set aside fraudulent conveyances bars this suit by the United States to enforce its tax assessment.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1033

DAVID JAMES TEMPLETON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C2) is unpublished, but the decision is noted at 972 F.2d 352 (Table). The opinion of the district court (Pet. App. A1-A35) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1992. Petitions for rehearing were denied on August 31, 1992, and September 22, 1992 (Pet. App. D1). The petition for a writ of certiorari was filed on December 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 15, 1980, petitioners David James and Rachel Templeton filed a timely joint federal income tax return for 1979 (Pet. App. A4). In November of 1982, the Templetons transferred title in their residence to the trustees of the Seven Eighteen Trust (*id.* at A2-A3). The document purporting to create the Seven Eighteen Trust, and evidencing the transfer of the residence, was two pages in length. It named no beneficiaries and described the consideration for the transfer of the Templetons' residence as one dollar and "other valuable consideration" (*id.* at A3). The Templetons continued to reside on the property following the transfer and to pay the utility bills (*id.* at A2).

2. On April 25, 1984, the Internal Revenue Service made an assessment in the amount of $74,772 against the Templetons for their 1979 income tax liability (Pet. App. A5-A6; Gov't C.A. Br. 4). Despite notice and demand for payment, the Templetons refused to pay the assessment (Pet. App. A5). On April 20, 1989, the United States filed suit to reduce the assessment to judgment, to set aside the conveyance of the residence and to foreclose its federal tax lien on the property (*id.* at A5-A6; Gov't C.A. Br. 4). The government contended that the Templetons remained the owners of the residence because the purported transfer to the trust was ineffective. The transfer was ineffective either (i) because no valid trust had been created or (ii) because the transfer to the trust was a fraudulent conveyance (*ibid.*).

The Templetons moved to dismiss the government's complaint, claiming that the government failed to make a valid assessment against them (Pet. App. A7). One of the trustees of the Seven Eighteen Trust, petitioner Michael Venegoni, also filed a motion to dismiss, alleging that the district court lacked jurisdiction to void a

contract made in Indiana and that the Indiana statute of limitations on actions alleging fraud barred the government's fraudulent conveyance claim (*id.* at A9).

The district court granted summary judgment to the United States. The court held that the Templetons were the owners of the residence because no valid trust had been created and, alternatively, because the transfer was a fraudulent conveyance (Pet. App. A34-A35). The court rejected the Templetons' contention that the IRS failed to make a valid assessment against them, finding that the government had established a prima facie case and that the Templetons failed to rebut the resulting presumption of liability (*id.* at A9-A12).

The court emphasized that the trust documents in the record failed to satisfy two of the requirements under Indiana law for forming a valid trust: (i) the documents failed to list the valuable consideration exchanged for the transfer of the residence and (ii) the documents failed to list any beneficiary of the trust (Pet. App. A26). While stating that these omissions might not alone compel invalidation of the trust, the court held that the significant evidence of fraud in the execution of the trust compelled the court to invalidate the trust pursuant to its equitable powers (*id.* at A27-A28). The court noted several badges of fraud in the formation of the purported trust: the Templetons transferred the property during the time the IRS was in the process of investigating their 1979 tax return (*id.* at A31), they continued to reside at the residence after the transfer, paying the utility bills for the property (*id.* at A32), they owned no other real estate or other significant property when the trust was established (*id.* at A32-A33), no meaningful consideration was exchanged for the property (*id.* at A32), and no beneficiaries were designated in the trust instrument (*ibid.*).

The court further concluded that the fraud engaged in by petitioners made the conveyance of the residence to

the trust void as in fraud of creditors under Indiana's fraudulent conveyance statute, Ind. Code Ann. § 32-2-1-14 (Burns 1980) (Pet. App. A31). In so ruling, the court rejected the trustee's claim that the Indiana statute of limitations, which provides a six-year limitations period on actions alleging fraud, barred the government's suit. The court concluded that, while federal courts are to apply state substantive law in actions to set aside a fraudulent conveyance and foreclose on a tax lien, the claim of the United States to enforce its tax assessment against the Templetons is subject to the applicable federal, not state, statute of limitations (*id.* at A18-A19).[1]

3. The court of appeals affirmed "for the reasons stated in the district court's thorough opinion" (Pet. App. C2).

ARGUMENT

The courts below correctly held that the United States could foreclose its lien on the taxpayers' residence because the conveyance of that property to the trust was ineffective. The decision in this case does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Because the taxpayers purportedly conveyed their residence to the trust more than six years before the govenment filed this suit to enforce its tax assessment, petitioners claim (Pet. 16-24) that this action is barred by Indiana's six-year statute of limitations for actions challenging fraudulent conveyances (see Ind. Code Ann.

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[1] The district court also rejected the trustee's argument that the United States Constitution and the Indiana Constitution prohibited federal courts from voiding fraudulent conveyances based on contracts made in Indiana (Pet. App. A16).

§ 34-1-2-1 (Burns 1986)). Petitioners' contention is incorrect.[2]

The United States brought this tax collection suit under authority conferred by Congress in the Internal Revenue Code. The Code provides a specific statute of limitations for suits brought by the United States to enforce tax assessments. 26 U.S.C. 6502(a). It has long been established that suits brought by the United States to enforce federal rights are subject only to federal, not state, statutes of limitations. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); *United States* v. *Wurdemann*, 663 F.2d 50, 51 (8th Cir. 1981); *United States* v. *Fernon*, 640 F.2d 609, 612 (5th Cir. 1981).

Section 6321 of the Internal Revenue Code creates a tax lien in favor of the United States "upon all property and rights to property" belonging to a delinquent taxpayer. 26 U.S.C. 6321. This federal tax lien, which arises upon assessment, continues in effect until the liability is satisfied or the lien becomes unenforceable by lapse of time. 26 U.S.C. 6322. The Internal Revenue Code authorizes the United States to bring suit "in a district court of the United States to enforce the lien of the United States" (26 U.S.C. 7403) by a proceeding commenced at any time within six years of the date of the assessment (26 U.S.C. 6502(a)).[3] Since the tax assessment in this case was made on April 25, 1984, and the suit was initiated on April 20, 1989, one year before

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[2] The additional grounds urged by petitioners in support of the petition assert no conflict and require no response.

[3] Section 6502(a) of the Internal Revenue Code has recently been amended to provide a ten-year limitations period for bringing suit. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11317, 104 Stat. 1388-458. The new limitations period applies to taxes assessed after November 5, 1990, and to taxes assessed on or before that date if the six-year period had not expired as of that date. *Ibid.*

the six-year period expired, the courts below correctly concluded that the claims of the United States in this case are not time-barred.

Relying on *United States* v. *Vellalos*, 780 F. Supp. 705 (D. Haw. 1992), appeal pending, No. 92-15491 (9th Cir.), petitioners contend (Pet. 20) that the period for bringing this tax collection suit is not six years from the date of assessment, as provided by Section 6502 of the Internal Revenue Code, but is six years from the date of the conveyance, as provided by the Indiana statute of limitations concerning fraudulent conveyance actions. In *Vellalos*, the district court held that a fraudulent conveyance claim brought by the United States was barred by Hawaii's four-year statute of limitations on actions based on fraud. The court recognized the established rule that the claims of the United States are not subject to state statutes of limitations, but distinguished that rule on the theory that the four-year period provided by the Hawaii statute was not a *limitations* provision, but was instead an element of the underlying cause of action. 780 F. Supp. at 707. The Ninth Circuit cases on which the *Vellalos* decision is based have distinguished *United States* v. *Summerlin* and have applied state limitations provisions to bar claims of the United States on the theory that the requisite statutory period was not a statute of limitations, but was an essential element of the underlying state-law claim. See *United States* v. *California*, 655 F.2d 914 (9th Cir. 1980); *United States* v. *Hartford Accident & Indem. Co.*, 460 F.2d 17 (9th Cir.), cert. denied, 409 U.S. 979 (1972).[4]

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[4] See also *United States* v. *California*, 932 F.2d 1346 (9th Cir. 1991), cert. granted on other issues, 113 S. Ct. 50 (1992) (presenting question whether the federal common law claim of the United States for money had and received as a means of recovering unlawful state taxes is subject to compliance with state administrative claim procedures and state statute of limitations).

Petitioners contend (Pet. 23) that the period of limitations provided by Section 34-1-2-1 of the Indiana Code similarly forms an element of, rather than limiting the commencement of, the substantive cause of action for fraudulent conveyances. Petitioners therefore claim that the state statute bars the action brought by the United States in this case. The Indiana statute, however, establishes a traditional limitation on the period in which suit may be brought; it is not an element of the underlying claim for relief under state law. See *Forth* v. *Forth*, 409 N.E.2d 641, 644 (Ind. Ct. App. 1980) (the statute of limitations runs from the date "the cause of action for fraud accrues"). The cases on which petitioner relies are therefore inapposite.

2. In any event, the decision in this case rests on grounds that are independent of the Indiana fraudulent conveyance statute. The district court correctly held that the taxpayers remained the owners of the residence—and that the United States was therefore permitted to foreclose on the property to satisfy their tax debt—because the trust to which the property purportedly had been transferred was invalid (Pet. App. A28). Indiana law imposes several formal requirements for creation of a valid trust. In particular, the terms of the trust must establish "the identity of the beneficiary." Ind. Code Ann. § 30-4-2-1 (Burns 1989 & Supp. 1992). The trust documents in the record of this case, however, failed to designate any beneficiaries of the putative trust (Pet. App. A3).[5] Under Indiana law, the omission of

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[5] Petitioners claim (Pet. 29) that the district court improperly refused an *in camera* inspection of documents which they assert would show the existence of beneficiaries. As the district court correctly held, however, it was the Templetons' failure to offer the putative trust agreement as evidence, not the court's failure to accept it, that resulted in omission of those documents from the record of this case (Pet. App. B4-B5).

designated beneficiaries might not alone compel invalidation of the trust.[6] *Meyer* v. *Northern Indiana Bank & Trust Co.*, 490 N.E.2d 400, 402-403 (Ind. Ct. App. 1986). But the court retains equitable power to invalidate a trust when the trust was improperly formed or other circumstances surrounding its creation so warrant.[7] Ind. Code Ann. § 30-4-3-30 (Burns 1989). See *Apple* v. *Apple*, 274 N.E.2d 402, 408 (Ind. App. 1971) (the bases for declaring a trust invalid "have never been expressly enunciated in full but rather left to the courts in the exercise of their equity powers"). In this case, the fact that the trust was designed to accomplish a fraudulent purpose (see page 3, *supra*), in combination with formal defects such as the absence of designated beneficiaries, combined to justify the court's determination that the trust was not valid under Indiana law. This fact-bound application of state-law principles, concurred in by both of the courts below, does not

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[6] A court may determine that a resulting trust exists if one of the requirements for an express trust is not satisfied. *Pavy* v. *Peoples Bank & Trust Co.*, 195 N.E.2d 862, 867 (Ind. App. 1964).

[7] Petitioners cite Article I, § 10, Cl. 1 of the United States Constitution, the Tenth Amendment to the United States Constitution, and Article I, § 24 of the Indiana Constitution for the assertion that the prohibition against impairing the obligation of contracts prohibits a district court from voiding a fraudulent conveyance based on a contract made in Indiana (Pet. 47-55). This contention is wholly without merit. This impairment of contracts argument has been rejected in the specific context of creditors challenging fraudulent conveyances, *Bertsch* v. *McBride*, 58 F.2d 799, 801 (6th Cir. 1932), and federal and state courts have repeatedly voided fraudulent conveyances in suits initiated by third parties. See, *e.g.*, *Eyler* v. *Commissioner*, 760 F.2d 1129 (11th Cir. 1985); *Nader* v. *Commissioner*, 323 F.2d 139 (7th Cir. 1963); *Jackson* v. *Russell*, 533 N.E.2d 153 (Ind. Ct. App. 1989), cert. denied, 494 U.S. 1004 (1990).

warrant further review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993

Supreme Court, U.S.
FILED
MAR 2 1993
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. 92-1033

DAVID JAMES TEMPLETON, ET AL
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

REPLY BRIEF BY PETITIONERS, TO UNITED STATES IN OPPOSITION

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EDITOR'S NOTE

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Indiana Code 34-1-2-1. 4

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
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DAVID JAMES TEMPLETON, ET AL.
Petitioners
vs.
UNITED STATES OF AMERICA
Respondent

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY BRIEF BY PETITIONERS, TO UNITED STATES OPPOSITION

I.

Respondent's lone QUESTION PRESENTED for this court's review, is not the question presented by Petitioner.

Petitioners' two primary questions were:

(1) WHETHER A STATE'S STATUTE OF LIMITATIONS COVERING SUITS FOR FRAUD, BARS THE UNITED STATES FROM BRINGING SUIT FOR FRAUD BEYOND THE TIME LIMIT ESTABLISHED BY THE STATE. (Emphasis added)

(2) WHETHER THE 7TH CIRCUIT COURT OF APPEALS CAN VIOLATE ITS OWN STANDARD FOR SUMMARY JUDGMENT AND AFFIRM SUMMARY JUDGMENT WHEN THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE.

Respondent's one question listed in

its Brief in Opposition, is stated:

"Whether the Indiana statute of limitations for commencing actions to set aside fraudulent conveyances bars this suit by the United States to enforce its tax assessment." (Emphasis added)

Respondent has attempted to cloud the issue by changing the direction of the Questions Presented.

Petitioners are not challenging whether Respondent is barred by the Indiana Statutes of Limitations to enforce its tax assessment, against Templetons.

Rather, Petitioners DO challenge Respondent's claim to set aside a conveyance by bringing suit for fraud beyond the maximum time frame allowed under state law, and the court's authority to allow the suit.

On Pg. 5 Line 20 Respondent refers to the six-year period granted to it, after the date of its assessment, to enforce its lien:

"The Internal Revenue Code authorizes the United States to bring suit...to enforce the lien of the United States' by a proceeeding commenced at any time within six years of the date of the assessment..."

Respondent states that the six-year time period begins on the date of its assessment. This may be true, but it does not apply to this instant case, where the six-year time period is not to enforce any lien, but to bring suit pertaining to an alleged fraudulent convevance. For that aspect of this instant case, the time period begins on the date of the alleged fraudulent action and not on the alleged assessment date.

Indiana law has long held that the cause of action for fraud accrues and the statute of limitations begins to run from the date the alleged fraud was perpetrated.

The starting date in this instant

case was November 2, 1982, the date of the transfer of property from Templetons to the Trust. Respondent's suit was brought on April 20, 1989, six years and five months later.

"Indiana Code 34-1-2-1 provides that suits for relief from fraud must be commenced within six (6) years of the accrual of the action. In Indiana the cause of action for fraud accrues and the statute of limitations begins to run, from the date the fraud is perpetrated." See Forth v. Forth, 409 N.E. 2d 641, 642 (Ind. Apps. 2nd Cir. 1980)

"The statute runs unless there is active and intentional concealment of the fraud. See Forth v. Forth, 409 N.E.2d at 642 FN5.

In this instant proceeding, there is no allegation, let alone any facts, of concealment of the action that is alleged to constitute fraud.

It is clear that the Indiana Statute of Limitations for bringing suit for fraud, applies in this case, as to the foreclosure on the property in trust.

U.S. vs. Vellalos 780 F. Supp. 705 D.C. Hawaii (1992) shows the distinction between Respondent's "right" to turn an assessment into a judgment or to foreclose on any property owned by Templetons, from that of bringing an action alleging fraud, beyond the governing Indiana statute of limitations on property not owned by Templetons.

II.

The district court compounded its error by granting summary judgment to the government when there were genuine issues of material fact in dispute.

Petitioners presented five (5) affidavits to the district court establishing the facts in dispute. The facts stated therein were never rebutted by Respondent.

It is well established in law that "fraud determinations are findings of

fact..." Archer v. Commissioner, 227 F2d 270, 274 (5th Cir. 1955). Any such determination of fraud should have been for a jury to decide.

In addition to those facts established, it is a well established principle of law that "fraud rests upon intent" and intent is also for a jury to decide.

III.

There is no requirement in Indiana law for a trust agreement to be recorded. Petitioners repeatedly offered the instant trust agreement to the court upon request, for an in-camera inspection, to clear up any question the court may have as to the validity of the Trust. Petitioners' offer was ignored.

IV.

CONCLUSION: Respondent states that the decisions of the courts below:

"...do not conflict with any decision of this court or of any other court of appeals." (Emphasis added)

The decisions of the courts below certainly do conflict with this court, as no other court allows for summary judgment when there are material issues of fact in dispute.

Review by this court is warranted, as there is conflict between federal district courts and state courts on the issue of state statutes of limitations, and reversible error exists as to the violation of the standards for summary judgment by the courts below, established by this court and the 7th Circuit Court of Appeals.

THEREFORE, The Petition For a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

Date: 3-24-93

Petitioners:

Rachel Templeton

David & Rachel Templeton
Michael Venegoni, as Trustee of The Seven Eighteen Trust